

JAPANESE SECRECY LAW AND INTERNATIONAL STANDARDS

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In a democratic country, laws concerning classification of national security information, release of such information to the public, and any criminal penalties for unauthorized disclosure are central to both the state's ability to protect itself from those who would do it harm and to maintaining the democratic character of the country. The laws must permit a state to protect secrecy when necessary for the security of the state. At the same time, the laws must assure that the public has the information that it needs to know what its government is doing and to hold its leaders accountable.

Therefore, a government considering altering existing laws, especially in ways that will increase secrecy, must proceed carefully with deliberate speed and must consult fully with all elements of civil society. It also has an obligation to explain fully and persuasively why the law is needed and to explain any deviations from best practices of democratic governments. The Japanese government failed in each one of these obligations with the recent passage of the Act on the Protection of Specially Designated Secrets (SDS).¹ This article explores each of these failures and argues that the government needs to reconsider the legislation and implement it in ways that mitigate these harms.

¹ 特定秘密の保護に関する法律 (*tokutei himitsu no hogo ni kansuru hōritsu*) [Act on the Protection of Specially Designated Secrets] (tentative translation), Act No. 108 of 2013, (Japan) Art. 23(1)-(5), <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&ia=03&x=49&y=21&ky=%E7%A7%98%E5%AF%86%E4%BF%9D%E8%AD%B7%E6%B3%95&page=1>.

WHY THE RUSH?

The Japanese government released a summary of the proposed secrecy bill on September 3, 2013. During the two-week comment period—which was only half the amount of time normally allocated for comment—government data shows that it received over 90,480 comments, with almost 70,000 of those comments opposing the bill.² Prime Minister Shinzo Abe and his Cabinet approved a draft bill and submitted it to the Diet on October 25.³ Despite strong opposition from organizations (such as the Japan Federation of Bar Associations and the Open Society Justice Initiative), the media, scholars, and international human rights groups, and amid calls for careful discussion from many Japanese citizens, Prime Minister Abe remarkably railroaded the bill through the House of Representatives in just one month.⁴ Only a few hours after the final version was introduced in the House of Representatives on November 25, a vote was held on draft modifications and amendments proposed by the opposition. The points at issue, raised by witnesses and speakers at public hearings, were not given ample time for discussion and the bill was passed through to the upper house of parliament. Committee hearings began in the House of Councilors on November 28, and on December 6, 2013, the bill was voted, unchanged, into law.⁵

This short period of only seven weeks of parliamentary and public consultation was not sufficient to allow full and searching public debate and discussion in Japan that is necessary in dealing with an issue of such importance to the functioning of a

² Sanae Fujita, “The Japanese Secrecy Act: A serious step backwards for Transparency, Human Rights and Democracy,” *Blogs The Human Rights Center*, University of Essex, Aug. 1. 2014, available at <http://blogs.essex.ac.uk/hrc/2014/08/01/the-japanese-secrecy-act-a-serious-step-backwards-for-transparency-human-rights-and-democracy/#more-207>; Lawrence Repeta, *Raising the Wall of Secrecy in Japan-the State Secrecy Law of 2013*, 21 MEIJI LAW JOURNAL 13, 22 (2014) (discussing deliberations in the diet, and citing numbers from official government report on comments received, available at <http://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=060130903&Mode=0>).

³ Repeta, *Raising the Wall of Secrecy in Japan*, at 24; THE ACT ON THE PROTECTION OF SPECIALLY DESIGNATED SECRETS (THE “ACT”) INFRINGES UPON THE RIGHTS OF CITIZENS AND THE MEDIA UNDER ARTICLE 19 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (THE “COVENANT”), *Center for Civil and Political Rights* (report of the Center for Civil and Political Rights submitted to the United Nations Human Rights Committee), available at http://www.ccprcentre.org/doc/2014/06/INT_CCPR_CSS_JPN_17355_E.pdf.

⁴ *Id.*; Jonathan Soble, *Japan passes controversial secrecy law*, FINANCIAL TIMES, Dec. 8, 2013, available at <http://www.ft.com/intl/cms/s/0/1d7e6088-5feb-11e3-b360-00144feabdc0.html#axzz38DpKvcHP>.

⁵ Repeta, *Raising the Wall of Secrecy in Japan*, at 29; Act on the Protection of Specially Designated Secrets (Japan), Art. 23(1)-(5). See also, Standard for unified implementation related classification, declassification, and security clearance (Japan), “English Standards for Public Comment” English translation by Sanae Fujita (Aug. 2014) (on file with the author).

democratic society. Japanese civil society and opposition parties, which were not very familiar with these issues, were not able to consult sufficiently with colleagues in other countries or to educate themselves and the Diet members about universal standards. The Government's numerous inconsistencies and changes in statements during deliberations in the Diet only furthered the confusion.

On July 24th, the Abe Government released draft Standards for Uniform Implementation of the Specially Designated Secrets Act. The draft does provide some useful guidance and clarification, but continues to fall short of international standards. . The drafts standards were shared with the general public and open for the standard one-month comment period, twice as long as the two weeks allowed for the SDS itself. The comment period is intended to invite suggestion from the general public in preparation for implementation of the act as well as to promote fairness and improve transparency. In responding to the many comments that have been submitted, the Abe Government will have an opportunity to move the legislation closer to international standards.

TWO EXAMPLES OF MORE DELIBERATE CONSIDERATION

The two months from introduction to final passage of the SDS itself stands in sharp contrast with how other countries have considered such legislation. I discuss two typical examples. The first is a recent example from South Africa and the other from the last time that the United States amended the laws relating to these issues.

South African Secrecy Law

The government of South Africa first introduced the Protection of Information Bill in 2008.⁶ However, after a strong backlash by civil society and the media, the bill was withdrawn, and then reintroduced in March 2010 as the Protection of State Information Bill (POSIB).⁷ After a long period of debate, the national assembly initially adopted the POSIB at the end of 2011, with an amended version adopted

⁶ Verne Harris, *What is still wrong with the Protection of State Information Bill?*, NELSON MANDELA FOUNDATION, Oct. 10, 2013, available at <http://www.nelsonmandela.org/news/entry/what-is-still-wrong-with-the-protection-of-state-information-bill>.

⁷ 2012 Review, PARLIAMENTARY MONITORING GROUP, <http://www.pmg.org.za/2012-review-rashaad-alli>; *National Assembly Approves Controversial Information Bill*, REPORTERS WITHOUT BORDERS, April 23, 2013, available at <http://www.nelsonmandela.org/news/entry/what-is-still-wrong-with-the-protection-of-state-information-bill>.

in April 2013.⁸ Despite the fact that the majority supporting the government in the South African legislature is even larger than that of the Diet supporting the current Japanese government, thirty-four months went by before the law was passed, not including the several years it took for the POSIB to be reintroduced from the initial introduction. During that period there were more than 900 amendments considered, close to 100 meetings (both public and in committee), and a full discussion of international standards.⁹

Although the final text was far from satisfactory in the eyes of much of South African civil society the bill was vastly improved from the text as originally introduced. Among the most important changes made were these: removing a vague description of “national security” that would have allowed the over-classification of information; improving the thresholds for classifying information by requiring demonstrative not speculative harm to national security; disallowing an attempt to permit the classification of commercial information; and establishing a Classification Review Committee.¹⁰ Activists still are troubled by the POSIB’s lack of a public interest defense; its lack of clarity, inconsistencies, provisions without clear meaning; and that it creates a parallel access regime to one that is already established under the state’s constitution.¹¹

After the long stint through parliament and several months sitting in limbo, President Jacob Zuma refused to sign the bill in September 2013, sending the legislation back to parliament for consideration where, as of November 2014, it waits.¹²

Intelligence Identities Protection Act of 1982 (United States)

Another example of a protracted public debate is seen in the United States prior to the Congress passing and the President signing legislation penalizing action

⁸ *Id.*

⁹ 2012 Review, PARLIAMENTARY MONITORING GROUP, <http://www.pmg.org.za/2012-review-rashaad-alli>.

¹⁰ See Dario Milo *Information Bill Needed- just not this one*, TIMES LIVE, Nov. 27, 2013, available at <http://www.timeslive.co.za/politics/2011/11/27/information-bill-needed---just-not-this-one>; *Protection of State Information Bill* (South Africa) B 6B- 2010, Sep. 5, 2011, available at <http://www.pmg.org.za/files/bills/110905b6b-2010.pdf>.

¹¹ Harris, *What is still wrong with the Protection of State Information Bill?*

¹² David Smith, *South Africa Secrecy Law Surprise as Zuma Rejects Controversial Bill*, THE GUARDIAN, Sept. 12, 2013, available at <http://www.theguardian.com/world/2013/sep/12/south-africa-zuma-secrecy-bill>.

leading to the publication of information identifying covert intelligence agents – the Intelligence Identities Protection Act of 1982.¹³

The impetus for this legislation was the routine publication in a monthly American magazine of the names of alleged CIA covert agents stationed abroad in American embassies. The CIA argued that the publication made it difficult for the persons named to carry out their functions and placed their lives in jeopardy. President Gerald Ford initially called for legislation making disclosure of agent's identities a crime in Jan 1976.¹⁴ It was not until 1979 that the US Congress began a four-year long legislative process to enact the law. During this period, lasting from early 1979 to late 1982, Congress considered over fifteen different bills.¹⁵ Committees including the House Intelligence Committee, the Senate Judiciary Committee, and the Senate Select Committee on Intelligence held hearings and received testimony from members of the executive branch and of civil society (I personally testified on nine occasions before six committees and subcommittees).¹⁶ There was extensive public debate, numerous NGOs took positions mostly against the legislation.

¹³ Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421-426.

¹⁴ James M Naughton, *Ford Promises Efforts to Restore Confidence in C.I.A.*, N.Y. TIMES, Jan. 31, 1976, Proquest Historical Newspapers: the N.Y. Times (1851-2010) with Index (1851-1993), pg 38.

¹⁵ See James R. Ferguson, *Government Secrecy After the Cold War: the Role of Congress*, 34 B.C. L. REV. 451, at 484 (1993).

¹⁶ *Proposals to Criminalize the Unauthorized Disclosure of the Identities of Undercover United States Intelligence Officers and Agents: Hearings before the Subcomm. on Legislation of the H.R. Permanent Select Comm. on Intelligence*, 96th Cong. 66-84 (1980) (testimony of Mr. Morton Halperin, director of the Center for National Security Studies); *Graymail, S. 1482: Hearing before the Subcomm. on Criminal Justice of the S. Comm. on the Judiciary*, 96th Cong. 42-53 (1980) (statement of Morton H. Halperin, Center for National Security Studies, accompanied by Alan Adler); *National Intelligence Act of 1908: Hearings on S. 2248 before the S. Select Comm. on Intelligence*, 96th Cong. 145-180 (1980) (Testimony of Jerry J. Berman, Legislative counsel, ACLU, accompanied by Morton Halperin, Director of the Center for National Securities Studies); *HR 6588, The Nat. Intelligence Act of 1980: Hearings before the Subcomm. on Legislation of HR Permanent Select Comm. on Intelligence*, 96th Cong. 142-174 (1980) (testimony of Mr. Morton Halperin, Center for National Security Studies); *Prepublication Review and Secrecy Agreements: Hearings before the Subcomm. on Oversight of the H.R. Perm. Select Comm. on Intelligence*, 96th Cong. 120-176 (1980) (testimony of Mr. Morton H. Halperin, Director, ACLU Project on Nat. Security, and Director, Center for Nat. Security Studies); *Intelligence Identities Protection Legislation: Hearings on S. 2216 before the S. Select Comm. on Intelligence*, 96th Cong. 87-98 (1980) (testimony of Morton H. Halperin, accompanied by Allen Adler, on behalf of the ACLU); *Intelligence Identities Protection Act, S 2216: Hearing before the S. Comm. on the Judiciary*, 96th Cong. 94-121 (Statements of Floyd Abrams, Attorney; Morton Halperin, Director, Center for Nat. Security Studies, ACLU, Accompanied by Jerry Berman, Legislative Counsel; Ford Rowna, Attorney, and Sol Yurick, Pen American center); *H.R. 4, The Intelligence Identities Protection Act: Hearings before the Subcomm. on Legislation of the H.R. Perm. Select Comm. on Intelligence*, 97th Cong. 72-92 (1981) (testimony of Jerry J. Berman, Esq. and Morton Halperin, ACLU); *Intelligence Identities Protection Act of 1981: Hearing on S. 391 before the Subcomm. on security and Terrorism of the S. Comm. on the Judiciary*, 97th Cong. 73-96 (1981) (statements of

As a result of the public and congressional debate a number of changes were made in the legislation. The most important of which included narrowing the class of information protected by the Act, limiting the scope to information that made no real contribution to democratic values of free speech, and adding required elements of intent.¹⁷ While there was debate regarding the scope of the provision covering private persons throughout the legislative process, the bill which passed has not prevented the press from revealing the identity of covert agents.

These two examples are representative of how democratic countries deal with proposals to expand laws relating to preventing and punishing the disclosure of classified information. A democratic government has the obligation to proceed slowly and permit time for full debate in the legislature and in the public and for consultation with experts both at home and internationally. The Japanese government did not do so and thus failed in its obligation to its citizens.

WHY THE NEED?

Why did the new Japanese government conclude that new secrecy legislation was needed? This action was just one of a series of moves by the new LDP government to make Japan a more “normal” nation, shedding the restrictions that it accepted during the American occupation and assuming greater responsibility for its security and that of allies.

Still the question is why Japan needed additional secrecy legislation. After all, Japan already had a secrecy law, which punished disclosure of classified information by government officials and, in some circumstances by private citizens, even including members of the press. In fact one journalist had been indicted and convicted for publishing information about secret negotiations between Japan and the United States relating to the reversion of Okinawa and one journalist was threatened with prosecution for writing about the secret agreement between the Japanese and American governments permitting ships with nuclear weapons to call at Japanese ports.¹⁸

Morton H. Halperin, Director, Center of Nat. Security Studies, ACLU, and Jerry J. Berman, Legislative Counsel, ACLU);

¹⁷ See James R. Ferguson, *Government Secrecy After the Cold War*, 34 B.C. L. REV. 451.

¹⁸ Lawrence Repeta, *Japan's 2013 State Secrecy Act—The Abe Administration's Threat to News Reporting* “Japan Focus,” 12 THE ASIA-PACIFIC JOURNAL 10, (2014), available at <http://www.japanfocus.org/-Lawrence-Repeta/4086>.

The government of Japan attributed the need for additional security legislation almost entirely to the United States. Government spokespersons asserted that U.S. government (USG) officials were clear that they would not be able to share classified information with Japan until and unless the legislation was enacted.¹⁹ In his press conference on December 9, 2013, Prime Minister Abe left no doubt: “(V)arious countries around the world have explicit rules regarding...state secrets. For that reason Japan would be unable to receive information from such countries unless it establishes rules for managing such kinds of secret information”²⁰ However, while U.S. Ambassador Caroline Kennedy endorsed the development of Japanese security policy, stating “[w]e support the evolution of Japan’s Security Policies, as they create a new national security strategy, establish a National Security Council, and take steps to protect National Security Council, and take steps to protect national security secrets...”²¹ this does not support the assertion that the USG warned that it could not share secret information unless a new secrecy law was enacted.

The Japanese government has not backed up this claim by pointing to any public statement by an American government official to this affect. It has also not said specifically which USG official conveyed the message to the Japanese government and when. Such specificity would permit attempts to verify that such a statement was made. Even if a USG official had made such a statement it is very doubtful that he or she would have insisted on the specific provisions which are the basis of public opposition to the legislation that was enacted.

(Discussing the case of Nishiyama where a reporter for a mainstream news organization was arrested, tried, and convicted of improperly soliciting the leak of a government secret after having received copies of cables showing evidence contradictory to the government’s declared position relating to terms of the return of Okinawa to Japanese control from the United States; and the case of Ohta Masakatsu who was threatened by public officials for soliciting information after he conducted a series of interviews with retired senior officials of the Ministry of Foreign Affairs).

¹⁹ *Japan’s State Security Act*, 13. See generally Lucy Craft “Japan’s State Secrets Law: Hailed by U.S., Denounced by Japanese” NPR, Dec. 13, 2013, available at <http://www.npr.org/blogs/parallels/2013/12/31/258655342/japans-state-secrets-law-hailed-by-u-s-denounced-by-japanese>.

²⁰ Press Conference by Prime Minister Shinzo Abe, Dec. 9, 2013, available at http://japan.kantei.go.jp/96_abe/statement/201312/09kaiken_e.html (statement of Prime Minister Shinzo Abe).

²¹ Lucy Craft, “Japan’s State Secrecy Law: Hailed by U.S., Denounced by Japanese” NPR, Dec. 31, 2013, <http://www.npr.org/blogs/parallels/2013/12/31/258655342/japans-state-secrets-law-hailed-by-u-s-denounced-by-japanese>.

There are two lines of argument that cast serious doubt on the suggestion that a law deviating in significant ways from best international practice was demanded by the American government as the price of sharing information with the Japanese government on critical national security matters. The first relates to the attitude and behavior of the American government. The second relates to what the laws of other close American allies say and how it affects information sharing.

US-Japanese Consultation

As shown by the American government reaction to the Japanese government's decision to broaden its definition of what the Japanese constitution permits it to do in the security field, the national security establishment in the United States is eager to see Japan play a broader security role. It is unlikely to decline to share information about mutual threats which would be necessary to implement any decision to cooperate.

Moreover, since the signing of the mutual security treaty between Japan and the United States in 1960,²² the USG has routinely shared highly classified information with the Japanese government. I have been personally involved in sharing such information going back to the Johnson Administration in the late 1960s. While serving in the USG, I have often proposed, and have been present when others proposed sharing information with the Japanese government. Never have I heard a USG official suggest that the information could not be shared because the Japanese secrecy laws were not strong enough. In fact I am confident that few if any people who have occupied, or now occupy senior national security positions in the USG, are familiar with the specifics of the American or Japanese (or other allies) laws relating to punishing the disclosure of classified information.

A recent example is sufficient to demonstrate the proposition that the details of Japan's secrecy law are not and has never been an impediment to sharing classified information between the two governments.

In 2008 I served on the Congressional Commission on the Strategic Posture of the United States. During the deliberations of the Commission I proposed a

²² Treaty of Mutual Cooperation and Security between the United States and Japan (日本国とアメリカ合衆国との間の相互協力及び安全保障条約) (*Nippon-koku to Amerika-gasshūkoku to no Aida no Sōgo Kyōryoku oyobi Anzen Hoshō Jōyaku*), U.S.-Japan, 1960, 11 U.S.T. 1632.

recommendation that the USG consult more intensively with Japan on American nuclear policy. This recommendation was received with unanimous approval by the nine members of what is known as the Perry-Schlesinger Commission and was included in its final report. Before the Report was completed, the recommendations, including this one, were discussed with a number of government officials in many different agencies. As a result of these consultations a number of the recommendations were modified. The recommendation regarding consultation with Japan on nuclear policy was not changed and not one official suggested that such information sharing would not be possible because of deficiencies in Japan's secrecy law.

The recommendation as it appeared in the Report is as follows:

“In particular, now is the time to establish a much more extensive dialogue with Japan on nuclear issues, limited only by the desires of the Japanese government. Such a dialogue with Japan would also increase the credibility of extended deterrence.”²³

Following the release of the Report, the Obama Administration undertook the periodic Nuclear Posture Review. As part of the process the administration undertook a full and comprehensive discussion with the Japanese government on American nuclear policy particularly as it related to extended deterrence in Asia. The Defense Department official responsible for the posture review told me that the consultation was so close and detailed that in effect that section of the report was a joint product of the two governments.

I visited Japan shortly after the report was completed and was told by many Japanese government officials how pleased they were not only by the outcome of the posture review but by the depth of the consultation. No one mentioned and no one seemed affected by the alleged shortcomings of the Japanese secrecy law. This consultation has continued to the present day with periodic meetings of a designated consultation group.

Laws of other American Allies

²³ Perry, William J., and James R. Schlesinger. "America's Strategic Posture: The Final Report of the Congressional Commission on the Strategic Posture of the United States." (2009) at 70. *United States Institute of Peace*. United States Institute of Peace Press.

The second line of reasoning which casts light on the plausibility of Japan's assertion that the USG demanded changes to the secrecy law as a pre-condition for sharing sensitive information is an examination of similar statutes of other close allies of the United States.

Such a review reveals that most if not all of the provisions in the Japanese law to which objection has been raised are not present in the objectionable form in the laws of close allies of the United States, including the United Kingdom, Canada, Australia, and New Zealand, with which the United States has the most complete intelligence information sharing.

The comparable law in Canada is the *Canadian Security of Information Act*.²⁴ Under the Canadian Security Act, it is an offense for a government official to improperly communicate special operational information, but unlike under Japan's SDS, a public interest defense is available where a public servant discloses information in the public interest. The Canadian law uses virtually the same factors as the European Court of Human Rights in determining whether a disclosure was in the Public Interest—both consider the availability of any effective, alternative remedies; the public interest in the information; the actual harm caused by the disclosure weighed against the public interest in the information's release; the reasonableness of the public official's belief in the accuracy and importance of the information, and the severity of the penalty.²⁵

Denmark's state secrecy law also provides a public interest defense for the publication of state secrets where the person is acting in the legitimate interest of obvious public interest.”²⁶

In New Zealand, the Protected Disclosures Act aims to promote the public interest by “(a) facilitating the disclosure and investigation of matters of serious wrong doing by an organisation” and by “(b) protecting employees who in accordance with this Act make disclosures of information about serious wrongdoing in or by an organisation.”²⁷ This law aims to facilitate disclosure to promote open

²⁴ Security of Information Act (Canada) Sec. 15, R.S.C. 1985, c. O-5.

²⁵ “Submission for the Periodic Review of Japan” Open Society Justice Initiative submission to the U.N. Human Rights Committee, June 2014. See also, *Guja v. Moldova*, ECtHR (Grand Chamber), 12 Feb. 2008, paras. 73-77. *Bucur v. Romania*, ECtHR, 8 Jan 2013, paras. 95-119.

²⁶ Criminal Code (Denmark), Section 152 (e)(2010).

²⁷ Protected Disclosures Act, 5(a), 2000 (N.Z.).

government, whereas the Japanese SDS law aims to do the opposite, to prevent government information from being shared with the public, even when it is in the public interest.

Penalties for inappropriate disclosure under the Japanese SDS are on the extreme end of those imposed by other US allies.²⁸ The SDS calls for up to ten years imprisonment for intentional disclosure by a public servant, and up to two years for unintentional leaking.²⁹ Compare to the United Kingdom, the United States' closest military and intelligence ally, which calls for a maximum of two years for public disclosure by a public servant, and Canada where individuals bound to secrecy who inappropriately share information are liable for a maximum five years imprisonment.³⁰

From this review it is clear that the USG is more than willing to share information with nations' whose secrecy laws are far less harsh or restrictive than the policies recently adopted by Japan. Therefore, while a USG official may have suggested in passing to a Japanese government official that information sharing would be easier if Japan tightened its secrecy – and there is nothing on the record to support even this – it is inconceivable that the USG official demanded the specific provisions in dispute in Japan as the price of more intimate sharing of information. In any case, as this article documents, prior to the enactment of the law there was very extensive sharing of the most sensitive information related to nuclear deterrence and many other subjects.

WHAT IS WRONG WITH THE LAW?

As is evidenced from even this brief review of US allies' statutes, there is a wide variation in the laws of democratic countries relating to classifying information and punishing the publication of classified information. However, there is a growing international consensus that such laws must respect the right to know and provide

²⁸ See "Tense Diet Passes New Secrets Law," *nippon.com*, Jan.9, 2014, *available at* <http://www.nippon.com/en/genre/politics/I00051/>.

²⁹ See Act on the Protection of Specially Designated Secrets (Japan), Art. 23(1)-(5).

³⁰ Security of Information Act (Canada) Sec. 13(3). R.S.C 1985, c O-5. Sandra Coliver, "US prosecution of Snowden and Manning exceeds international norm," *The Guardian*, June 26, 2013. <http://www.theguardian.com/commentisfree/2013/jun/26/edward-snowden-espionage-act-charges>; and "Tense Diet Passes New Secrets Law," *nippon.com*.

clear and explicit limits on what can be classified and for how long and limiting the circumstances in which criminal penalties would apply. This growing international consensus reflected in court decisions as well as legislation and practice is captured in the Global Principles on National Security and the Right to Information, or the “Tshwane Principles”.³¹

The Tshwane Principles were developed during a multi-year procedure of consultation with governments, retired officials, and civil society in a process in which I actively participated and which was led by the Open Society Justice Initiative with which I am affiliated.³² The principles codify best practices relating to a state’s authority to withhold information on national security grounds and to punish the disclosure of such information.³³ No government has a legal obligation to implement the Principles and no government has, in fact, implemented all of them. Nonetheless, a democratic government has an obligation to its people to consider the best practices of other democratic governments as it legislates in this area. If it cannot accept one or more of the principles, I believe it owes its parliament and its people an explanation.

Any government committed to transparency and democratic governance should examine the Tshwane Principles if it is considering legislation in this area and justify explicitly to its public and parliament any deviation from these principles. The Japanese government failed to do this.

There are a number of ways in which the Japanese Secrecy Law deviates from the Tshwane Principles. Let me discuss the most important ones:

- a. Information should not be classified if either (1) the public value of the information outweighs the likely harm from disclosure or (2) the information is vital to public understanding of the government’s policy or reveals serious violations of international law or imminent threats to health or safety.

³¹ *Global Principles on National Security and the Right to Information (“The Tshwane Principles”)*, finalized in Tshwane; South Africa; June 12, 2013, available at <http://fas.org/sgp/library/tshwane.pdf>.

³² See Open Society Justice Initiative, “Fact Sheet: The Tshwane Principles on National Security and the Right to Information: an overview in 15 points” Open Society Foundations, June 2013, <http://www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points>.

³³ *The Tshwane Principles*, Introduction.

The Tshwane Principles require a government to take account of the value of information for public understanding of critical issues as well as the potential harm to national security of disclosure of the information.³⁴ The Principles suggest that information which has very high public value— such as the structures and powers of government agencies— carries a heavy presumption against classification which can be over-come for specific compelling reasons and for limited times.³⁵ Additionally, some information is so important to public debate— such as information on violations of International Human Rights and Humanitarian law— that it cannot be classified and that the government has an obligation to proactively make it public.³⁶ For all other information, the public need and right to know should be taken into account in deciding whether to classify or de-classify such information.³⁷

An example of the invocation of such a standard is the United States' Executive Order of Classification (E.O. 13526). Section 3.1(d) of the Executive Order states that officials, when considering whether to declassify information, must decide “whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure.”³⁸

The Japanese SDS and the draft Standards for Implementation fall shamefully short of the standards for classification recommended under the Tshwane Principles.³⁹ As discussed, the SDS provides some definitions on the classification of information, in the “Appended Table,” however, the examples provided are not comprehensive and do not include any category of information exempt from classification, e.g., human rights abuses, or of categories that are otherwise protected by international law

The government of Japan should have used more precision in drafting the designations of classifications and should have included exceptions. In addition to the United States, Japan could look to the laws of Chile, Colombia, the Czech

³⁴ See *Tshwane Principles*.

³⁵ See *Tshwane Principles*, Princs. 10(b)-(h).

³⁶ See *Tshwane Principles*, Princ. 10(a).

³⁷ See *Tshwane Principles*, Princ. 9 “Information that Legitimately May Be Withheld.”

³⁸ Exec. Order No. 13,526, 33 C.F.R. § 2001 (2014).

³⁹ “Public Comments on the Standards for Uniform Implementation of the Specially Designated Secrets Act” Submitted by Morton H Halperin to the Government of Japan (in Japanese) on Aug 19, 2014, on file with the author.

Republic, Germany, Mexico, Moldova, the Netherlands, Norway, Paraguay, Romania, Spain and Sweden for provisions in law prohibiting the classification of information concerning corruption, crimes against humanity, or human rights violations.⁴⁰

- b. The law should not provide for criminal penalties for disclosure of information by government officials unless 1) the information is in a precise narrow category established by law, 2) is not information which should never be classified, and 3) actual harm resulted from the release of the information. A government official releasing classified information should have a whistle-blower's defense that the importance of the information to public debate outweighed the potential harm.

Under the Tshwane Principles, public disclosure of classified or otherwise confidential information that shows wrongdoing should not be subject to criminal or civil charges.⁴¹ The government must be required to demonstrate the disclosure in fact harmed the national defense and that is within a narrow category of information that has specifically been made subject to criminal penalties; such penalties should be proportionate.

The Tshwane Principles also require that for all information, a public official charged with criminal disclosure be able to assert a defense that the value of the information for public debate outweighs the harm that the disclosure caused.⁴² The Principles 37-47 of the Tshwane Principles provide protection for public interest disclosures by public officials. They require procedures which protect government officials who disclose information relating to such matters such as human rights violations, corruption, or dangers to public safety as long as the person follows procedures laid out in the law for first taking such matters to appropriate oversight bodies. The Principles do not define "public interest," they do however encourage states to proactively publish a list of categories of especially high public interest that should never be withheld, as discussed above.

⁴⁰ See Maeve McDonagh, Public Interest Test in Freedom of Information Legislation, Univ. College Cork (2013), at pp.4-5, available at <http://www.transparencyconference.nl/wp-content/uploads/2012/05/McDonagh.doc>.

⁴¹ See *Tshwane Principles*, Princs. 37-40 (guidance on public disclosure); Princ. 41(a) (outlining protection against retaliation).

⁴² See *Tshwane Principles*, Princs. 40, 41, 43, and 46.

Under Article 23(1) of Japan's Self Defense Forces Law of 2001, persons handling designated secrets as part of his or her duties faced a maximum penalty of five years' imprisonment for an intentional, unauthorized disclosure.⁴³ The SDS has doubled this penalty to 10 years imprisonment and a fine of up to 10 million yen (US \$ 97,500) per violation, without giving a sufficient explanation or reasoning as to why. Additionally, Art 23(4) criminalizes negligent acts by a person handling designated secrets that result in the disclosure of classified information. Persons convicted of this crime, a violation of Art 23(1), face up to two years imprisonment and a fine of up to 500,000 yen per violation. This maximum sentence is significantly longer than the punishment most countries provide.⁴⁴

Additionally, the Japanese SDS provides no protections for public officials for releasing information, as called for in the Tshwane Principles, but rather only outlines the consequences for a public official releasing information.⁴⁵ The disclosure by a public servant who receives secret information for the sake of public interest may be punishable up to five years' imprisonment. The law places excessive restrictions and limitations upon when a person is permitted to provide a specially designated secret even when in the "public interest" which appears to be synonymous in this case with the government's interest.⁴⁶ The SDS does not protect whistleblowers who uncover corruption, threats to public health, threats to the environment, or otherwise serve a public interest, and any disclosure of a "specially designated secret" is a violation of the law.

⁴³ The Self Defense Forces Law preceded the Specially Designated Secrets Act. Revisions in 2001 to the Self Defense Forces law provided the model for the 2013 Act, and established a new category of information called 'defense secrets' (bōei himitsu). See Lawrence Repeta, *Raising the Wall of Secrecy in Japan—the State Secrecy Law of 2013*, 21 Meji Law Journal 13 (2013), available at https://m-repo.lib.meiji.ac.jp/dspace/bitstream/10291/16665/1/lawjournal_21_13.pdf.

⁴⁴ A survey conducted by the Open Society Justice Initiative of the laws of 26 countries, found that in 13 countries, in the absence of espionage, treason, disclosure to a foreign state, or intent to cause harm, the law provides for a maximum penalty of five years or less. See "Submission regarding the Standards for Uniform Implementation of the Specially Designated Secrets Act" OPEN SOCIETY JUSTICE INITIATIVE, Aug 15, 2014.

⁴⁵ Act on the Protection of Specially Designated Secrets, Art. 3 (Japan) (Defines the secrecy power "Heads of administrative agencies shall designate as Specially Designated Secrets' non-public information related to the work of their agencies which concerns matters listed in the appendix and is especially necessary to keep secret because release would bring the risk of severe damage to national security.").

⁴⁶ See Specially Designated Secrets Act (Japan), Arts. 10, 22.

- c. If the law provides for criminal penalties for private citizens it should only apply in narrow carefully defined circumstances in which there is proof of intent to harm national security and where the value of the information to public debate does not out-weigh the actual harm caused by the publication of the information.

The Tshwane Principles provide limitations on when journalists and private citizens may face criminal prosecution regarding their possession of classified information.⁴⁷ Principles 43 and 46 state criminal action against those who leak information should only be pursued if there is a “real and identifiable risk of causing significant harm” that overrides the public interest. Under Principles 47 and 48, journalists are granted special protections as well, and should not be prosecuted for their possessing, receiving, disclosing, or seeking classified information and should not be forced to reveal confidential sources.

Under the SDS, criminal penalties may apply to private citizens, including journalists for improperly seeking, holding, or releasing classified information. Article 24 of the SDS not unreasonably applies criminal penalties to private citizens in extreme circumstances—individuals who acquire a secret by any method that “violates the control of a person who holds a specially designated secret,” acquire illicit personal gain, or cause harm to Japan’s safety from obtaining a secret are punishable by imprisonment of up to ten years in prison and up to ten million yen.⁴⁸ This regulation still creates a legitimate concern that the statute will chill the actions of journalists and other private citizens who may fear harsh criminal penalties. Article 22 further purports to protect journalists by stating that expanding the interpretation of the act to unfairly violate the fundamental human rights of citizens is prohibited and that due consideration shall be paid to freedom of news reporting. Yet, Article 22 concludes with the caveat that journalists are only protected so long as their

⁴⁷ See “An Overview: Fifteen Things the Principles Say: Global Principles on National Security and the Right to Information” OPEN SOCIETY FOUNDATIONS, June 2013, <http://www.opensocietyfoundations.org/fact-sheets/tshwane-principles-national-security-and-right-information-overview-15-points>.

⁴⁸ Specially Designated Secrets Act (Japan), Art. 24 (Provides criminal penalties where individuals who acquire a secret by any method that “violates the control of a person who holds a specially designated secret,” acquires illicit personal gain, or causes harm to Japan’s Safety by obtaining a secret are punishable by up to ten years imprisonment and up to ten million yen).

news reporting is not conducted by “extremely unreasonable means,” a term left undefined by the SDS.

Criminal penalties are also possible in situations where the information that is released was not legitimately or correctly classified as a secret in the first place.⁴⁹ Additionally, there is no requirement for the government to prove actual or likelihood of harm for a conviction and includes no requirement for malicious intent to be shown, only that the disclosure itself must be intentional.

Regarding criminal penalties for non-government employees, the phrase “illicit personal gain” as used in Article 24 risks a wide interpretation, yet should not include the benefit a person may gain from alerting the public to an action of the government. The SDS and the draft implementation standards include no consideration for the punishment of inappropriate disclosure to be proportionate to the harm,⁵⁰ in stark contrast to the acceptable policies outlined in the Tshwane Principles and reflected in state practice.

- d. Information should be subject to classification only if identifiable harm to national security can be specified with narrow categories.

The Tshwane Principles do not permit restrictions on the right to information for national security purposes unless a government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.⁵¹ In relation to protecting national security, governments should only restrict the release of state information where the disclosure of information “must pose a real and identifiable risk of significant harm to a legitimate national security interest.”⁵² The Principles provide that the reasons for classification should indicate the narrow category of information (corresponding those outlined in Article 9) as well as the harm that could result from disclosure.⁵³

⁴⁹ See “Submission regarding the Standards for Uniform Implementation of the Specially Designated Secrets Act” Open Society Justice Initiative, Aug 15, 2014.

⁵⁰ *Id.*

⁵¹ See *Tshwane Principles*, Princ. 3. (Requirements for Restricting the Right to Information on National Security Grounds).

⁵² *Id.* at Princ. 3(c).

⁵³ *Tshwane Principles*, Princ. 9. (The categories include information regarding the on-going defense plans, operations and capabilities; the production capabilities, or use of weapons and other military systems; information

Article 3 of the SDS sets forth what may properly be designated as secret.⁵⁴ The SDS uses the language “risk of causing severe damage” when referencing the potential harm of releasing a specially designated secret, a much broader and more ambiguous terminology than the suggested standard of a real and identifiable risk of significant harm.⁵⁵ Under this standard, the Japanese government could cite potentially all information as carrying a risk of causing harm if released, giving the government a dangerously wide brush in deciding what information to maintain as classified.

The law also stipulates who may classify information as a specially designated secret. Under the SDS, “heads of administrative organs,” are granted the responsibility, however in practice it will be a wider pool of senior bureaucrats making the decisions on behalf of the ministers and directors general of the government.⁵⁶ Under the initial adoption of the law, 19 government organs are granted specific authority for designating state secrets, and when considering additional provisions of the law, the number of organs with authority to designate secrets jumps to 61. This includes bodies with little to no relation to national security, including the Cultural Affairs Agency, the Ministry of Health Labor and Welfare, as well as the Nuclear Regulation Authority, raising concerns that the government may be able to hide information relating to nuclear plants and accidents.⁵⁷

The Japan government’s subsequent release of the draft Standards for Implementation provides some additional guidance however they remain insufficient. While the Japanese draft Standards requires the head of an administrative organ to provide in writing the necessity for designating a piece of information as secret, there is no direction as to what must be

about the specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions against harm and whose effectiveness depends on secrecy; and information concerning national security provided by a foreign state or international body with an express expectation of confidentiality or other communications concerning national security matters); *Tshwane Principles*, Princ. 11(b).

⁵⁴ Specially Designated Secrets Act (Japan), Art 3.

⁵⁵ *Id.* at Arts. 3, 10 (1)-(3).

⁵⁶ “News Navigator: Who will select special state secrets?” Mainichi, 18 July 2014 (English Translation), available here <http://mainichi.jp/english/english/perspectives/news/20140718p2a00m0na018000c.html>

⁵⁷ *Id.*

included in the written statement.⁵⁸ This allows a simple statement of “risk to national security” or “risk of losing trust from foreign countries” as sufficient justification for designation.

- e. There should be effective over-sight of the classification process within the executive branch, by the legislature, and the courts.

Several of the Tshwane Principles address the importance of establishing checks and oversight of the designation and maintenance of state secrets.⁵⁹ Principle 26 calls for an independent authority able to provide individuals requesting classified information a “speedy and low cost review” of a refusal to disclose information as well as the competence and resources to ensure effective review including full access to all relevant information.⁶⁰ The Tshwane Principles entitle individuals to obtain independent and effective review of all “relevant issues by a competent court or tribunal” and a public, fact-specific, written analysis when a court makes a ruling warranting the withholding of information, except in extraordinary circumstances.⁶¹

The Tshwane principles also make clear that states should establish or identify independent bodies to receive and investigate protected disclosures from whistleblowers.⁶² These bodies should be institutionally and operationally independent from the security sector and other authorities, including the executive branch from where disclosures may be made.⁶³ The measures Japan has taken fall significantly short of these standards.

Currently, Japan has at least four designated authorities responsible for providing oversight to the implementation of the SDS: a council of external

⁵⁸“Submission regarding the Standards for Uniform Implementation of the Specially Designated Secrets Act” Open Society Justice Initiative, 15 Aug 2014.

⁵⁹ *Tshwane Principles*, Princ. 31. (Principle 31 provides for states to establish “independent oversight bodies to oversee sector entities including their operations, regulations, policies, finances, and administration.” These bodies should be “institutionally, operationally, and financially independent from the institutions they are mandated to oversee”).

⁶⁰ *Tshwane Principles*, Princ. 26.

⁶¹ *Id.*

⁶² See *Tshwane Principles*, Princs. 6, 31-33. (Princ. 33(d) adds that the law should require security sector institutions to allow cooperation for access and interpretation of information required for their function and Principle 39B(1) calls on states to establish or identify independent bodies, separate from the security sector and executive branch, to review protected disclosures from whistleblowers).

⁶³ See “Submission regarding the Standards for Uniform Implementation of the Specially Designated Secrets Act” Open Society Justice Initiative, 15 Aug 2014 (on file with the author).

advisors and three governmental bodies. The council of advisors only has advisory powers and cannot direct for information to be un-classified if it deems the classification inappropriate. The Committee for the Protection and Oversight, the Independent Public Records Management Secretary, and the Information Security Oversight Division—the three bodies—have no independence from the agencies initially designating secrets.⁶⁴

Along with the release of the draft standards, Prime Minister Abe's administration has promised to establish an advisory panel on information protection as well as an oversight committee within the government to review the legitimacy of state designated secrets.⁶⁵ The Diet established the standing Information Monitoring Assessment Committee which appears to exclude Members of Parliament from small parties and does not have power to compel other government agencies to disclose information.⁶⁶ The Committee may request an administrative organ to submit to the Committee a specially designated secret for review, however, the head of the administrative organ is not obliged to comply. Additionally, the Committee is not designed to receive complaints from whistleblowers or to assist in their protection from penalties, and has no binding power to deter inappropriate designation of secrets.

As the Abe administration moves to implement the law and to consider revisions, it should consult broadly both within Japan and with international experts so as to move closer to international norms.

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⁶⁴ *Id.*

⁶⁵ Sandra Coliver "Japan's State Secrecy Law Faulted in Human Rights Review," OPEN SOCIETY FOUNDATIONS, *Voices*, 13 Aug. 2014, *available at* <http://www.opensocietyfoundations.org/voices/japans-state-secrecy-law-faulted-human-rights-review>.

⁶⁶ See "Submission regarding the Standards for Uniform Implementation of the Specially Designated Secrets Act" Open Society Justice Initiative, 15 Aug 2014.